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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THUNDER BASIN COAL COMPANY,
Petitioner,
v.
ROBERT B. REICH, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN MINING CONGRESS AND NATIONAL COAL ASSOCIATION IN SUPPORT OF PETITIONER

Of Counsel:
EDWARD M. GREEN
MARK G. ELLIS
AMERICAN MINING CONGRESS
1920 N Street, N.W.
Washington, D.C. 20036

WILLIAM E. HYNAN
NATIONAL COAL ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036

TIMOTHY M. BIDDLE *
THOMAS C. MEANS
J. MICHAEL KLISE
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
Attorneys for Amici Curiae American Mining Congress and National Coal Association

* Counsel of Record

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QUESTION PRESENTED

Does the Federal Mine Safety and Health Act divest the district courts of subject-matter jurisdiction over pre-enforcement challenges to the application of the Secretary of Labor's regulations purporting to implement that Act, where the challenges pertain to constitutional issues, rights conferred by other statutes, or other matters outside the administrative expertise of the Federal Mine Safety and Health Review Commission?

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BRIEF OF *AMICI CURIAE* AMERICAN MINING CONGRESS AND NATIONAL COAL ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The American Mining Congress ("AMC") is an association of mining companies that produce most of the Nation's metals, coal, and industrial and agricultural minerals, as well as manufacturers of mining and mineral processing machinery, equipment, and supplies, and the engineering, contracting, and banking firms that serve the mining industry.

The National Coal Association ("NCA") is an association whose members constitute a substantial percentage of the Nation's coal-producing capacity, and includes companies that own and operate coal-mining facilities or

engage in businesses that are directly related to the production of coal, such as equipment manufacturers, coal sales companies, transporters, consultants, and resource developers.

AMC and NCA have a compelling interest in the availabiltiy of preenforcement judicial relief under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §§ 801 *et seq.* (1988), and are adversely affected by the total foreclosure of such relief by the decision below. The Constitution and sound principles of administrative law and policy dictate that an entire industry cannot be totally cut off from judicial protection against agency injustice. Yet that would be the practical result of the decision below.

When, as in this case, an enforcement action by the Secretary would deprive an operator of rights arising outside the Mine Act, the specialized administrative relief available from the Federal Mine Safety and Health Reciew Commission ("Commission") is of no avail. In such cases—as, for example, when the Commission refuses to prevent the Mine Act from being used as a union "organizing tool" [1] in violation of mine operators' private property and National Labor Relations Act ("NLRA") rights—judicial review comes too late to provide meaningful protection of rights already infringed. In these instances, an operator must have access to the district courts for relief that the Commission cannot or will not provide. For these reasons, the court of appeals' decision denying preenforcement review should be reversed.[2]

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[1] *Kerr-McGee Coal Corp.*, 13 F.M.S.H.R.C. 1889, 1898 (ALJ 1991), *aff'd*, Nos. WEST 91-84-R *et al.*, 15 F.M.S.H.R.C. ——— (Mar. 4, 1993), *petition for review docketed*, No. 93-1250 (D.C. Cir. Apr. 1, 1993).

[2] Pursuant to Rule 37 of the Rules of the Court, the parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of the Court.

STATEMENT

Amici adopt Petitioner's Statement of the Case and seek to emphasize only a few points which will help to clarify the legal issues before the Court and the practical realities confronting the mining industry.

1. This case involves the extraordinary circumstance in which an administrative agency, in the course of carrying out its enforcement responsibilities under its organic statute, infringes on fundamental rights that exist independent of that statute. Regulation by its nature diminishes a regulated party's preexisting rights, but this Court has long recognized that regulation cannot extinguish all such rights in our constitutional system, lest the Constitution itself become a nullity.[3] Nor do subsequent legislative enactments extinguish rights conferred by earlier ones. Rather, absent specific direction from Congress, the statutes coexist, and harmonizing them and declaring "what the law is" is, "emphatically, the province and duty" of the courts.[4] The court of appeals in this case implicitly acknowledged the primacy of judicial review. It stated that enforcement actions under the Mine Act provide adequate review of issues of constitutional rights and statutory conflict, precisely *because* review by a court of appeals is ultimately available. *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970, 974 (10th Cir. 1992). But the court ignored critical limitations of that form of review when confronting rights arising outside the agency's area of administrative expertise, and also ignored the fact that in the time required to obtain judicial review in that

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[3] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply").

[4] *Id.* at 177.

fashion,[5] an operator's rights under the Constitution and other statutes can be irreparably harmed.

2. When the government attempts to regulate in areas requiring specialized expertise, such as mine safety and health, the potential for an administrative agency to exceed its lawful bounds under the guise of administrative deference is great. Thus, courts must be wary of rewarding, by deference, the very impropriety alleged.[6] The decision below demonstrates the point. The court correctly pinpointed why Petitioner's challenges were outside the Commission's and the Secretary's respective spheres of administrative expertise when it acknowledged that: (1) the Commission and its ALJs "may not enjoy any special expertise enabling them to decide constitutional challenges to the Mine Act and construction of the Act with other laws"; and (2) the enforcement which Petitioner sought to enjoin involved a potential violation which "in

[5] Of the Commission's 32 reported decisions in 1992 that reached the merits of citations or orders issued by the Mine Safety and Health Administration ("MSHA") on identified dates, *no* decisions were issued within a year of the date of citation or order, and only 5 were issued within 2 years. Sixteen cases took from 2 to 3 years to reach a final Commission decision, 7 took from 3 to 4 years, and 4 took 4 years or longer. *See* F.M.S.H.R.C. Decisions, vol. 14 (1992). This trend has continued. Of particular interest here, a case involving an operator's challenge to a citation and order alleging the same type of violation that would be at issue here took over 28 months to reach a judicially reviewable Commission order. *See Kerr-McGee Coal Corp., supra* note 1 (citation and order issued October 25, 1990; Commission decision, March, 4, 1993; appeal pending).

Factoring in the time required for briefing and oral argument before a court of appeals prolongs judicial resolution even further. Another similar case took nearly 4 years to complete that process. *See Utah Power & Light Co. v. Secretary of Labor,* 897 F.2d 447, 448-49 (10th Cir. 1990) (citation issued April 15, 1986; Commission decision, March 29, 1988; court of appeals decision, February 26, 1990).

[6] *See Rohr Industries, Inc. v. Washington Metropolitan Area Transit Auth.,* 720 F.2d 1319, 1327 (D.C. Cir. 1983).

no way endangers the safety of its miners," which is the Secretary's area of expertise. 969 F.2d at 974, 975. Yet the court erroneously concluded that adjudication by the Commission nonetheless provided not only an "adequate," but also the "exclusive," remedy for Petitioner's non-Mine Act claims. *Id.* at 976.

3. The court erred in holding that preenforcement judicial review is unavailable because the Mine Act expressly grants the district courts subject-matter jurisdiction in only two provisions.[7] *See* 969 F.2d at 973. As this Court has recognized, merely because a statute expressly makes some acts judicially reviewable, it does not follow that Congress intended to exclude judicial review as to others. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967).

4. In seeking limited preenforcement judicial review of issues arising outside the Commission's and the Secretary's administrative expertise, the mining industry does not dispute that Congress sought to create a process for prompt adjudication of mine safety and health disputes. *See* 969 F.2d at 974. It does not follow, however, that Congress intended to strip the whole mining industry of the right to judicial protection of its fundamental rights, foreclosing all injunctive relief outside the administrative enforcement scheme. On the contrary, when the Mine Act does address the availability of injunctive relief, it precludes such relief only as to "interim mandatory health or safety standard[s]," not as to the type of agency action challenged here. Mine Act § 513, 30 U.S.C. § 960 (1988).

5. Similarly, this case does not implicate Congress' intention to provide a speedy response to newly manifested mine hazards or a meaningful deterrent to safety and

[7] *See* Mine Act §§ 108 (providing for Secretary to seek injunctive relief against operator in district court), 110(j) (Secretary may bring action to collect civil penalties in district court), 30 U.S.C. §§ 818, 820(j) (1988).

health violations through prompt enforcement action. Rather, this case involves prospective violations that would in no way endanger[] the safety of . . . miners." 969 F.2d at 975. Moreover, Petitioner sought relief from the district court through precisely the mechanism that would provide prompt, certain relief—an action for a preliminary injunction. The district court entered the injunction within 10 days after Petitioner filed suit [8]—a far cry from the months or years that it would take Petitioner to attain judicial review in an administrative enforcement proceeding.[9] Clearly, the statutory policy favoring speedy resolution of disputes was advanced, not undermined, by Petitioner's direct challenge in district court.

6. The undisputed facts in this case demonstrate a high potential for irreparable injury and present a compelling case for preenforcement judicial review. Without such review, nonunion operators could be required, under pain of citation, daily monetary penalties, and criminal liability, to admit a nonemployee union organizer onto company property, allow him to accompany a federal inspector on a thorough inspection of all areas of the operation, and give him access to voluminous information about the operator's business—thus forfeiting private property rights and rights under federal labor law that this Court reaffirmed just last Term.[10] No amount of relief months or years later, when a Mine Act enforcement proceeding finally reaches the stage of judicial review, can compensate for the unlawful advantage that a union would gain in an organizing campaign in the meantime, both from its organizer's wholesale access to company property and information and from the gain in his stature that would accompany his forced admission under

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[8] *See Thunder Basin Coal Co. v. Martin*, No. 91-CV-0050-B, slip op. at 3 (D. Wyo. Mar. 13, 1992).

[9] *See supra* note 5.

[10] *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992).

the Mine Act. Congress certainly never intended the Mine Act, *sub silentio*, to alter so radically the labor-management balance it fashioned under the NLRA.

SUMMARY OF ARGUMENT

Judicial review of administrative agency actions must be available unless clear and convincing evidence demonstrates that Congress intended to preclude it. There is no evidence that Congress intended to foreclose all preenforcement judicial review of the Secretary of Labor's actions under the Mine Act. On the contrary, the Commission's statutory expertise is limited to mine safety and health, and does not encompass legal issues arising outside that sphere. Although the Mine Act and its legislative history evince Congress' intent to grant the Commission primary jurisdiction over specified proceedings, Congress left intact a mining company's right to seek preenforcement relief in district court. By so doing, Congress recognized, contrary to the finding of the court below, that the Commission's jurisdiction was neither "exclusive" nor "adequate" to address every type of claim that a mine operator might raise, such as constitutional questions and claims involving statutory conflicts.

The Commission itself has acknowledged some limitations on its jurisdiction, but has wavered as to their nature and scope, causing significant uncertainty in the mining industry. Most recently, the Commission construed its jurisdiction narrowly, refusing to reach issues of statutory conflict; yet the court below banned Petitioner from the courthouse with the assurance that proceedings before the Commission were adequate to reach those very kinds of issues. Moreover, the Commission has repeatedly refused to grant mining companies declaratory relief from prospective enforcement actions, ruling that its ability to grant such relief is circumscribed by its specific grants of authority under the Mine Act. The net result of the Commission's vacillations and selectively

narrow view of its jurisdiction is that a company must first violate the law before it can learn what the law is.

A mere accusation of a violation—in the form of a citation or order issued by the Secretary—is enough under the Mine Act to cause irreparable harm to a mine operator, even if he successfully challenges the enforcement action in administrative proceedings before the Commission. The Mine Act requires rapid abatement of alleged violations even before they are adjudicated. A cited operator must either incur the costs of abatement, which can be substantial, or run the risk of further sanctions for failing to abate, including criminal sanctions and daily civil penalties of up to $5,000.

Abatement also carries nonmonetary costs, as this case illustrates. Abatement in this case would have required a nonunion operator to admit a union organizer onto company property for organizing purposes, in derogation of the operator's private property rights and other rights conferred by the NLRA. Such rights are beyond the Commission's expertise and therefore might escape review in an administrative proceeding. Furthermore, even if they were heard, they would not receive *judicial* review until months or even years later, long after the organizer's MSHA-compelled presence had altered the delicate labor-management balance that federal labor law seeks to preserve. To avert irreparable harm such as this, mining companies must be able to seek preenforcement relief in district court on matters outside the scope of the Commission's administrative expertise, and the court below erred in holding to the contrary.

ARGUMENT

I. THE MINE ACT DOES NOT PRECLUDE PREENFORCEMENT JUDICIAL REVIEW OF MATTERS FALLING OUTSIDE THE SECRETARY'S AND THE COMMISSION'S ADMINISTRATIVE EXPERTISE.

A. The Language And Legislative History Of The Mine Act Demonstrate That The Commission's Authority Is Not Plenary.

Access to courts is fundamental to our system of government. When an agency seeks to foreclose access to the courts, the question is not, as the court below assumed, whether the enabling statute authorizes judicial review, but whether the statute forbids it. A long line of decisions by this Court, buttressed by enactment of the Administrative Procedure Act, recognizes a presumption in favor of judicial review, which can be overcome only upon a showing of " 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories*, 378 U.S. at 140-41 (collecting cases; citing 5 U.S.C. §§ 701 (a), 702, 704; and quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)).

There is no evidence of a contrary legislative intent in the Mine Act. The primary adjudicative mechanism of the Act—administrative enforcement proceedings before the Commission, followed by judicial review of the Commission's decision in a federal court of appeals—is necessarily circumscribed by the jurisdictional authority conferred on the Commission by Congress. The Commission's members are chosen for their expertise in the subject of mine safety and health, not for general legal expertise. Mine Act § 113(a), 30 U.S.C. § 823(a) (1988).[11] Moreover, the causes of action over which the

[11] Section 113(a) of the Mine Act provides, in pertinent part:

> The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, *from among persons who by reason of training, education, or*

Commission can preside, although broad within the subject matter of mine safety and health, are limited to a few specific types of actions: contests of citations and orders issued by the Secretary; contests of related civil penalty proposals; applications for temporary relief from certain orders issued by the Secretary; contests of imminent danger orders of withdrawal; and discrimination complaints and compensation petitions filed by miners or by the Secretary on their behalf. Mine Act §§ 105(d), 105(b)(2), 107(e), 105(c), 111, 30 U.S.C. §§ 815(d), 815(b)(2), 817(e), 815(c), 821 (1988). These provisions, as the Commission itself has held, "delineate the scope of the Commission's jurisdiction." *Kaiser Coal Corp.*, 10 F.M.S.H.R.C. 1165, 1169 (1988).

The Mine Act's delineation of the Commission's jurisdiction leaves undisturbed a significant residuum within the jurisdiction of the district courts. Under the Act's plain language, the Commission's expertise does not reach legal issues arising outside the sphere of mine safety and health, such as questions of constitutional law (though the Commission has on occasion ventured into such areas, *see Thunder Basin*, 969 F.2d at 974 (noting Commission's past willingness to consider constitutional is-

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experience are qualified to carry out the functions of the Commission under this chapter.

30 U.S.C. § 823(a) (1988) (emphasis added). The legislative history further elaborated on the nature of the Commission's expertise:

> This qualification [in 30 U.S.C. § 823(a)] is not intended to limit the selection of members to technicians. It is the Committee's expectation that nontechnicians with the requisite administrative experience or persons whose qualifications are based upon either formal training or practical experience in mine safety and health or related matters would qualify for appointment.

S. Rep. No. 181, 95th Cong., 1st Sess. 47 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3447.

sues)).[12] Indeed, Congress itself expressly authorized jurisdiction in the district courts in §§ 108 and 110 of the Mine Act, 30 U.S.C. §§ 818, 820 (1988), a fact which confirms, contrary to the findings of the court below, that (1) the Commission's jurisdiction over mine safety and health is not exclusive,[13] and (2) permitting jurisdiction in the district courts does not *per se* "disrupt[] the review scheme Congress intended." [14] *See* 969 F.2d at 975-76.

Moreover, § 513 of the Mine Act, 30 U.S.C. § 960 (1988), confirms that access to district courts is a recognized part of, and not inimical to, the Mine Act's review scheme. Section 513 provides:

> In any proceeding in which the validity of any interim mandatory health or safety standard set forth

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[12] Moreover, as with any other agency, the Commission's jurisdiction does not extend to suits alleging that its own unlawful action has inflicted an injury for which the law, apart from the Commission's organic statute, affords a remedy. *See Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

[13] The court below cited §§ 108 and 110 as raising a negative implication that Congress intended to confer jurisdiction in district court only in those two instances. 969 F.2d at 973. The court's inference, however, is invalid, as this Court has made clear:

> "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. *The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.*"

Abbott Laboratories, 387 U.S. at 141 (quoting Louis L. Jaffe, *Judicial Control of Administrative Action* 357 (1965)) (emphasis added).

[14] The court below recited a lengthy portion of the legislative history reflecting Congress' disenchantment with delays in *de novo* district court trials on the merits of civil penalty determinations. 969 F.2d at 974 n.4. However accurate Congress' perception, it is not relevant to whether a district court can or should exercise jurisdiction in cases such as Petitioner's, which do not involve the adjudication of penalty determinations.

> in subchapter II and III of this chapter [30 U.S.C. §§ 841 *et seq.*, 861 *et seq.*] is in issue, no justice, judge, or court of the United States shall issue any temporary restraining order or preliminary injunction restraining the enforcement of such standard pending a determination of such issue on its merits.

This provision, which the court below never discussed despite claiming to account for the "*entire* legislative scheme," 969 F.2d at 972 (citations omitted; emphasis in original), sets forth the Mine Act's sole limitation on judicial injunctive relief.[15] As § 513 by its very presence demonstrates, Congress acknowledged the availability of suits for injunctive relief and barred them only to the extent stated in that provision: Congress precluded only temporary restraining orders and preliminary injunctions, and not permanent injunctions; and it precluded them only as to the Act's "interim mandatory health or safety standard[s]," leaving intact the parties' access to injunctive relief on other matters, such as the claims raised by Petitioner here.[16]

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[15] Congress enacted § 513 in 1969, as part of the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act, Pub. L. 91-173, 83 Stat. 742 (1969), previously codified at 30 U.S.C. §§ 801 *et seq.* (1976) ("Coal Act"), and retained it without change in 1977 in the Mine Act.

[16] In the Coal Act and the Mine Act, Congress legislated detailed interim mandatory health and safety standards, which were to remain in effect unless or until superseded by "improved mandatory health or safety standards" promulgated by the Secretary pursuant to § 101(a) of the Mine Act, 30 U.S.C. § 811(a) (1988). The regulations at issue here, 30 C.F.R. Part 40 (1992), concerning the selection of a representative of miners, are twice removed from the preclusive effect of § 513. First, they are regulatory rather than statutory and thus do not fall within § 513's limitation to statutory standards only. Second, they are not health and safety standards at all. They were not issued under § 101(a), but rather under the Secretary's general authority to "issue such regulations as [he] deems appropriate to carry out any provision of this Act." 30 U.S.C. § 957 (1988).

Moreover, access to the district courts is vital because constitutional questions "obviously are unsuited to resolution in administrative hearing procedures," *Califano v. Sanders*, 430 U.S. 99, 109 (1977), and because operators have no assurance that the Commission or its ALJs would entertain arguments based on constitutional rights or statutory conflict. The Commission has occasionally been willing to consider such arguments. *See Emery Mining Corp.*, 10 F.M.S.H.R.C. 276, 290-92 (1988), *aff'd in part and rev'd in part on other grounds sub nom. Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990); *Kenny Richardson*, 3 F.M.S.H.R.C. 8 (1981), *aff'd on other grounds sub nom. Richardson v. Secretary of Labor*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). But there is a substantial difference between an adjudicative agency's occasional *willingness* to consider such issues, and a district court's *duty* to do so. Mine operators face substantial uncertainty because the Commission and its ALJs have invoked the Mine Act on other occasions to fence in their expertise and responsibility, enabling them to avoid reaching such issues. *See, e.g., Kerr-McGee Coal Corp., supra*, slip op. at 11 ("nothing in the Mine Act or general principles of administrative law requires that the Secretary or the Commission defer to or incorporate the NLRA"); *Mid-Continent Resources, Inc.*, 10 F.M.S.H.R.C. 881, 886 (ALJ 1988) ("it is the function of this judge to adjudicate issues under the Mine Act, not the Labor Management Act"), *aff'd*, 12 F.M.S.H.R.C. 949 (1990). The Commission's vacillations create an untenable situation for an operator seeking adjudication of an issue of statutory conflict, and pose a substantial threat that a record developed in proceedings before the Commission would be inadequate to permit judicial review by a court of appeals.

B. The Commission's Decisions Confirm The Limits Of Its Jurisdiction And Authority.

The limitations on the Commission's jurisdiction and authority are evident not only from the language and legislative history of the Mine Act, but from the Commission's own decisions. On occasion, the mining industry has sought relief before the Commission and its ALJs, only to be met with the response that the Commission lacks the jurisdiction, expertise, or authority to grant the relief requested. Since the contrary conclusion—that the Commission has demonstrated its willingness to consider such matters as constitutional challenges or questions of statutory conflict—is one of the underpinnings of the decision below, *see* 969 F.2d at 974, *Amici* believe that it is crucial for the Court to have an accurate understanding of the Commission's rulings in this area.

1. *The Commission Has Held That the Mine Act's Specific Enforcement Provisions Narrowly Delineate the Scope of the Commission's Jurisdiction.*

The two leading Commission decisions discussing the scope of that agency's jurisdiction are *Richardson, supra,* which the court of appeals took into account, and *Kaiser Coal Corp.*, 10 F.M.S.H.R.C. 1165 (1988), which the court ignored. In *Richardson,* the Commission held that it had the power to determine the constitutionality of a provision of the Mine Act. 3 F.M.S.H.R.C. at 18. The holding rested on § 113(d) of the Act, 30 U.S.C. § 823(d), which the Commission found gave it "primary adjudicative jurisdiction over disputes arising under the Act" and authorized it to "decide independently questions of fact, law and policy." 3 F.M.S.H.R.C. at 18. In so ruling, the Commission admittedly rejected the weight of judicial authority that adjudication of constitutionality is beyond the scope of administrative agencies. *See* 3 F.M.S.H.R.C. at 18.

This broad view contrasts sharply with the Commission's approach seven years later in *Kaiser Coal,* in which an operator sought declaratory judgment concerning the applicability of one of the Secretary's mandatory safety standards to certain of its mines. The Secretary had previously cited the operator for allegedly violating the standard, but the case subsequently settled. 10 F.M.S.H.R.C. at 1167-68. In the meantime, the operator had petitioned for modification of the standard.[17] The petition was granted, but implementation of the modification was blocked when the Part 40 miners' representative filed a request for a hearing and the proceedings were continued indefinitely.[18] *Id.* at 1168. The operator then applied to the Commission for a declaratory judgment that the standard was inapplicable.

The Commission held that it lacked jurisdiction, because the asserted basis for it, § 113(d) of the Mine Act, 30 U.S.C. § 823(d)—the same provision that the Commission had found *supported* jurisdiction in *Richardson*—

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[17] Section 101(c) of the Mine Act, 30 U.S.C. § 811(c) (1988), provides a variance procedure in which the Commission has no role.

[18] The Mine Act gives the representative of miners (which, at unionized coal mines, is usually the UMWA) a prominent role in petitions for modification, which is one reason why the selection of a miners' representative bears closer scrutiny than the Secretary, the Commission, and the Tenth Circuit have given it. Under § 101(c), the representative of miners is entitled to notice of the filing of an operator's petition for modification, can intervene in the administrative review proceedings, and can petition for modification of standards at the mine. Moreover, as a participant in the proceedings, the representative of miners can seek judicial review of the Secretary's ruling under § 101(d) and can effectively block relief for years despite the Secretary's willingness, based upon his own investigation, to grant it to the operator. *See International Union, UMWA v. MSHA,* 823 F.2d 608 (D.C. Cir. 1987) (vacating, at request of miners' representative, Secretary's grant of interim relief from operation of mandatory safety standard pending final decision on petition for modification).

is purely procedural and does not confer jurisdiction beyond the scope of the Commission's authority delineated elsewhere in the Act. The Commission explained that its jurisdiction was limited to a few specific types of actions: contests of citations and orders issued by the Secretary; contests of related civil penalty proposals; applications for temporary relief from certain orders issued by the Secretary; contests of imminent danger orders of withdrawal; and discrimination complaints and compensation petitions filed by miners or by the Secretary on their behalf. 10 F.M.S.H.R.C. at 1169. The Commission held that § 113(d)(1) "creates no specific right of action or proceeding over which the Commission may preside," and encompasses matters only "in those proceedings *otherwise* properly filed pursuant to the Act." 10 F.M.S.H.R.C. at 1169-70 (emphasis in original). The Commission concluded:

> This language [§ 113(d)(1)] must be read in the proper statutory context discussed above, and is not an invitation from Congress to legislate for ourselves virtually unlimited jurisdiction over "any proceeding."

10 F.M.S.H.R.C. at 1170.[19]

This decision belies the court of appeals' conclusion that, merely because the Commission has shown a willingness to entertain constitutional questions outside its sphere of expertise, an operator is precluded from seeking injunctive relief in district court. *See* 969 F.2d at 974. To reach that erroneous conclusion, the court had to rely on *Richardson* without accounting for the far narrower view of jurisdiction that the Commission subsequently adopted in *Kaiser Coal*. In *Richardson*, the Commission found that § 113(d) was the very source of

[19] With respect to the Commission's authority and expertise to decide constitutional questions, it should be noted that there is no requirement that members of the Commission be attorneys, and the current Chairman is not an attorney.

the agency's jurisdiction—a conclusion which, because it infused § 113(d) with substantive content, has been largely eroded, if not entirely overruled, by *Kaiser Coal*'s holding that § 113(d) is purely procedural.

2. *The Commission Has Failed to Follow a Consistent, Predictable Policy Concerning the Adjudication of Questions of Statutory Conflict.*

Over the years, the Commission has wavered between a willingness to entertain questions of statutory conflict and, more recently, an outright rejection of them, underscoring the substantial difference between an adjudicative agency's "willingness" to consider statutory conflict issues and a district court's duty to do so.

In *Emery Mining Corp., supra*, the Commission was willing to reach such questions. In that instance, the Secretary had cited the operator for refusing to admit a nonemployee union representative to mine property to accompany an MSHA inspector as a Part 40 representative of miners. The operator, relying on principles of private property law developed under the NLRA, argued *inter alia* that it could properly condition the admission of this nonemployee to mine property on the execution of a waiver of liability which the operator required of all outsiders. *See* 10 F.M.S.H.R.C. at 289-90. The Commission proceeded to "balanc[e] . . . the competing interests" of the Mine Act and the NLRA. It concluded that no violation of the Mine Act occurred, because, under the law developed under the NLRA, the "balance of legitimate competing interests tips in favor of" the operator, who had a legitimate and substantial interest in protecting against liability for injuries that outsiders might suffer at the mine site. *Id.* at 292.

The Commission's apparent willingness to address and resolve questions of statutory conflict in *Emery* evaporated entirely with its recent decision in *Kerr-McGee, supra*, where the operator sought a similar review of com-

peting statutory interests. This time, the Commission emphatically refused to conduct the analysis:

> Although we cannot ignore other statutes when interpreting the Mine Act, nothing in the Mine Act or general principles of administrative law requires that the Secretary or the Commission defer to or incorporate the NLRA. *Our proper field of judicial inquiry is the Mine Act* . . . . We agree with the Secretary that he is not required to integrate the NLRA's concepts of collective bargaining into his regulations implementing the Mine Act. *Nor is this Commission required to integrate NLRA concepts into its interpretation of the Mine Act.*

Kerr-McGee, slip op. at 11 (emphasis added; citations omitted). Given that the Commission, at the Secretary's behest, chose to limit its "field of judicial inquiry" to the Mine Act, the Secretary is in no position now to claim that the Commission's jurisdiction over matters outside that field is exclusive.

These circumstances underscore the very real dilemma that an operator faces in attempting to resolve questions of statutory conflict. He is told by the Tenth Circuit, at the urging of the Secretary, that he must utilize Commission proceedings as his exclusive remedy for such claims; yet when he goes to the Commission, he is told, again at the Secretary's urging, that the Commission lacks the expertise to address these questions and that he is still "in the wrong forum" and should go to the National Labor Relations Board ("NLRB"). *Kerr-McGee*, slip op. at 12. One can readily imagine the NLRB taking a correspondingly narrow view of its expertise, leaving the statutory conflict unresolved and the operator caught in a crossfire, vulnerable to MSHA enforcement if he turns one way and unfair labor practice charges if he turns the other.

3. *The Commission Has Repeatedly Refused to Grant Requests for Preenforcement Declaratory Relief.*

A further measure of an operator's need for recourse to a forum having general federal-question jurisdiction is the Commission's long-standing refusal to grant preenforcement declaratory relief to operators seeking to foreclose unlawful action by the Secretary, or even to assume jurisdiction over petitions for such relief. Although the ostensible reasons for the refusal vary, for all practical purposes declaratory relief, which might obviate an operator's resort to a district court in circumstances such as those presented here, is not available despite the Commision's repeated assurances that it is.

The myth of declaratory judgments in Commission proceedings stems from *Climax Molybdenum Co.*, 2 F.M.S.H.R.C. 2748 (1980), *aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447 (10th Cir. 1983). In that case, the Secretary moved that the operator's challenge to dust control citations be dismissed as moot after the Secretary vacated the citations. The operator opposed the dismissal, seeking declaratory relief interpreting the standard to protect against future enforcement based on what the operator believed to be an erroneous interpretation. *See* 2 F.M.S.H.R.C. at 2748, 2750.

The Commission declined to issue declaratory relief, however, holding that the operator had not suffered economic harm, and noting that the Commission was "not yet convinced that our early resolution of these issues [through declaratory relief] is prudent." *Id.* at 2753. The Tenth Circuit affirmed, but with an unsettling conclusion:

> We recognize that in the case before us, there exists *considerable uncertainty* regarding the proper interpretation of the MSHA dust regulations. *We are sympathetic to the plight of industries that must structure their operations and make long-term capital*

> *investments in the face of this uncertain regulatory environment. Nevertheless, the scope of our review of the Commission's denial of declaratory relief is limited* to a determination of whether the Commission abused its discretion.

703 F.2d at 452 (emphasis added).[20]

In the years since *Climax Molybdenum*, the Commission has steadfastly declined to provide declaratory relief to operators, to the point of disclaiming jurisdiction over applications for declaratory relief outside a pending enforcement proceeding. *See Kaiser Coal, supra* (no jurisdiction over application for declaratory relief absent pending enforcement proceeding); *Beaver Creek Coal Co.*, 11 F.M.S.H.R.C. 2428 (1989) (declaratory relief denied; no present dispute between operator and Secretary, and no showing that Secretary will take enforcement action in future); *Mid-Continent Resources, Inc.*, 12 F.M.S.H.R.C. 949 (1990) (declaratory relief denied; case held moot because operator had failed to establish substantial likelihood of recurrence).

The history of the Commission's treatment of declaratory judgments illustrates the reality of seeking such relief in what the court below billed as the "exclusive" and "adequate" forum for challenging the legality of the Secretary's actions: applying for declaratory relief is futile. Therefore, operators must have access to the district courts or be foreclosed from declaratory relief altogether.

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[20] The result was particularly disturbing for the operator, who had spent $190,500 in a good-faith effort to ascertain the most feasible dust-control measures to implement at its mine to comply with the cited standard. *See* 2 F.M.S.H.R.C. at 2750 n.3. Moreover, the Tenth Circuit's deferential posture toward the Commission confirms the fallacy of that same Circuit's reasoning in the instant case that judicial review of enforcement actions is "adequate" to reach constitutional questions and other matters outside the Mine Act.

II. THE PRECLUSION OF PREENFORCEMENT JUDICIAL REVIEW IN DISTRICT COURT CREATES A DANGER OF IRREPARABLE HARM.

A. The Mine Act Requires Summary Abatement Of Alleged Violations.

Besides conflicting with Congress' intent to preserve access to the district courts except as to matters specifically within the Commission's areas of administrative expertise, the preclusion of preenforcement judicial review under the Mine Act creates a potential for irreparable harm to an operator who disagrees in good faith with the legality of an enforcement action by the Secretary. The court below perceived no problem, because, in its view, an operator who disobeys the Mine Act or regulations and incurs a citation or penalty "is only penalized if [he] loses on the merits of [his] claim." 969 F.2d at 975. By the time "any penalty is actually imposed," the court reasoned, the operator will have had a full and adequate hearing on the citation. *Id.*

But the court's analysis tells only half the story. The ultimate monetary penalty for an alleged violation is not the only cost that an operator may incur when cited for an alleged violation. The Mine Act also subjects him to a summary abatement requirement. Under § 104(a) of the Act, every citation must fix a "reasonable time for . . . abatement."[21] 30 U.S.C. § 814(a) (1988). An operator who fails to abate becomes subject to an order directing the withdrawal of all persons from the affected area of the mine, as well as to daily civil penalties of up to $5,000 until abatement occurs. 30 U.S.C. §§ 814(b), 820(b) (1988 & Supp. III 1991). In addition, opera-

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[21] Abatement periods under the Mine Act are often calculated in terms of minutes or hours rather than days. *See, e.g., Kerr-McGee*, 13 F.M.S.H.R.C. at 1889-90 ("failure to abate" order issued within 10-20 minutes of citation); *Utah Power & Light Co.*, 897 F.2d at 448-49 (citation gave operator 10 minutes to abate alleged violation).

tors are subject to orders requiring the shutdown of mining until abatement occurs. 30 U.S.C. § 814(d) (1988). Failure to comply with any order can lead to criminal penalties. 30 U.S.C. § 820(c), (d) (1988). Thus, the cost of abatement and the risks of a good-faith refusal to abate can be substantial,[22] yet without access to a district court, and with the Commission's intransigent refusal to grant declaratory relief, an operator who has reasonable grounds for questioning the legality of an enforcement action has no choice but to incur those costs or risk additional sanctions.

The court below gave such concerns short shrift. It did not address abatement costs at all. Moreover, although it conceded that the Secretary's threats of daily failure-to-abate penalties "in the face of a bona fide interpretive dispute are indeed troubling," it rationalized away that concern because, in its view, (1) the availability of an administrative hearing meant that such penalties "may be constitutionally valid," and (2) "[i]t seems questionable" that the Commission or a court of appeals would sustain a significant penalty in these circumstances. 969 F.2d at 976. These arguments, however, are pure speculation—particularly the latter one, which fails to account for Congress' amendment of the Mine Act in late 1990 to increase the daily penalty ceiling from $1,000 to $5,000 as a greater deterrent to violations.[23] Congress stated on that occasion that it "expect[ed] MSHA to assess significantly higher penalties across-the-

[22] *See, e.g., Climax Molybdenum, supra* (operator spent $190,500 attempting to achieve compliance with dust level standard).

[23] *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, § 3102, 104 Stat. 1388-29. The Conference Report explained that the increase was needed not only to restore the civil penalty ceilings to their original levels given the increased cost of living since 1977, but also because "a simple restoration will not achieve penalty levels high enough to serve as an effective deterrent to future violations of the Act." H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 689 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2394.

board given the five-fold increase in the maximum allowable penalty." H. R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 689 (1990), *reprinted in* 1990 U.S.C.C.A.N 2374, 2394.

Moreover, the court's speculation does not alleviate the "untenable position" in which an operator is placed in this situation, as the Tenth Circuit itself previously recognized:

> If the inspector does not agree with the operator's determination that someone is not an authorized miners' representative for § 103(f) purposes, . . . the operator must risk the issuance of a citation, the assessment of civil penalties, and the possible closure of a portion of the mine before it can get a determination from the Commission whether it was justified in refusing to allow the purported representative to exercise walkaround rights.

Utah Power & Light, 897 F.2d at 456. *Amici* question why, if the court found the operator's plight "untenable" then, the same court can find it so tolerable now.

The only answer that the court gave was that an operator can avoid daily penalties either by abating the violation while proceeding with the appeals process, or by seeking an expedited hearing. 969 F.2d at 976. But, as we have shown, this reasoning overlooks the irrecoverable costs of abatement—which may require extensive and expensive physical changes in a mine and, in this case, the surrender of a statutorily protected right—which preenforcement review could have spared the operator. Moreover, the court overstates the significance of an expedited hearing. The sole authority which the court cites provides that an expedited hearing "shall not be scheduled with less than four days notice." 29 C.F.R. § 2700.52(b) (1992). It does not guarantee that an expedited hearing will be held within four days of the notice, as the court below intimated, but only that it cannot be held on less than four days' notice. Even when an expedited hearing

(which is discretionary) is granted, relief may be more than a year away. *E.g., Utah Power & Light Co., Mining Div.*, 13 F.M.S.H.R.C. 1617 (1991). Moreover, the regulation does not provide for a stay of daily penalties, which can continue to accure "for each day during which [the] failure [to abate] or violation continues." Mine Act § 110(b), 30 U.S.C. § 820(b) (1988). The court's suggestion that it "apparently" does is wholly unsupported. *See* 969 F.2d at 976.

B. The Secretary's Regulations Construing Section 103(f) Of The Mine Act Threaten Operators' Rights Under Federal Labor Law.

The expenditure of unnecessary abatement costs is not the only irreparable harm that can flow from the preclusion of preenforcement judicial review. The instant case presents a particularly compelling illustration of other risks that operators face if they must wait for the administrative review process to run its lengthy course before they can obtain judicial review.

When the Secretary invokes Part 40 of his regulations [24] to force a nonunion operator to admit a union organizer to company property during an organizing campaign, the operator suffers legal injury in two respects: he sacrifices private property rights as well as

[24] 30 C.F.R. Part 40 (1992). Part 40 purports to implement § 103(f) of the Mine Act, which provides that a "representative authorized by his miners" shall be given the opportunity to accompany an MSHA inspector during an inspection of the mine "for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. § 813(f) (1988). The Secretary's regulations define "representative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act." 30 C.F.R. § 40.1(b)(1) (1992). An individual becomes a "representative of miners" by filing designation forms and other information with the Secretary and the operator, and the operator is required to post the designation on the mine bulletin board. 30 C.F.R. §§ 40.2-40.4 (1992).

rights conferred on him under federal labor law, and he risks being charged with unfair labor practices under those laws. The principal right that he sacrifices—the right to exclude strangers from private company property—was upheld by this Court just last Term in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992). *Lechmere* reaffirmed the "general rule" that an employer has a right to bar nonemployee union organizers from his property. *Id.* at 847 (quoting *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978)). The only exception is the "rare case" involving "inaccessible" employees. *Lechmere*, 112 S. Ct. at 848 (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

The union's burden of establishing such isolation is "a heavy one," *id.* at 849, giving the union a powerful incentive to seek other ways to "legitimize" its organizers' presence on mine property. But by choosing to advance its organizing goals by exploiting the Secretary's Part 40 regulations, the union nullifies an operator's right to exclude trespassers. Moreover, the operator's injury is compounded, because status as a "representative of miners" gains the union not only physical presence on mine property, but a host of other entitlements as well.[25] If a

[25] For example, a representative of miners stands in a privileged position to participate as a full-fledged party in all proceedings before the Commission and in petition for modification proceedings. *See* 30 U.S.C. §§ 811(c), 815(d), 817(e)(1), 821 (1988); 29 C.F.R. § 2700.4(a)-(b) (1992). He must also be given access to mine maps and the roof control plan at underground mines and must receive a copy, with opportunity to comment, of the mine's training plan. 30 C.F.R. §§ 48.3, 48.23, 75.220, 75.1203 (1992). In addition, he has the legal authority to initiate formal review proceedings of various types before the Commission and the Secretary. *See, e.g.*, 30 U.S.C. §§ 811(c), 815(d), 817(e)(1), 821 (1988). If an organizing campaign leads to litigation before the NLRB (an agency whose procedures do not provide for prehearing discovery), a union's MSHA-compelled access to company information can be particularly inequitable to the employer. *See generally* 29 C.F.R. Subpart B

nonunion operator is precluded from seeking preenforcement judicial review of his compelled recognition of the organizer as a "representative of miners," the organizing campaign can run its course before the operator's challenge to the Secretary's enforcement action can be heard by the Commission, let alone by a court of appeals, as happened in *Mid-Continent Resources, Inc., supra*. *See* 12 F.M.S.H.R.C. at 950-51 (citation and order, May 1986; NLRA representation election, December 1986; Commission decision finding case moot and refusing to reach merits, May 1990).

Besides obliterating private property rights, the forced recognition of a union organizer as a "representative of miners" also conflicts with the NLRA's scheme of exclusive, majority-based representation. *See* 29 U.S.C. § 159(a) (1988). Under the NLRA, a unionized employer commits an unfair labor practice if he negotiates or "deals with" any representative other than the majority representative. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684, 687 (1944). This principle controls labor relations at the workplace, notwithstanding the potentially conflicting policies of other statutes. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69-73 (1975) (Marshall, J.) (black employees' statutory interest in eliminating racial discrimination under Civil Rights Act did not justify their attempt to resolve employment dispute directly with employer instead of through union). Dealing with a representative whose majority status is unproven is an unfair labor practice—it would give the reputed representative "a deceptive cloak of authority with which to persuasively elicit additional employee support." *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 736 (1961).

The MSHA-forced recognition of a Mine Act "representative of miners" puts an operator in precisely this

(1992). *See also* NLRB, *Casehandling Manual* §§ 10292.4, 10352 (1983).

bind. By compelling an operator in the midst of a union organizing campaign, under threat of a Mine Act withdrawal order, daily civil penalties, and criminal liability for failure to comply, to deal with this "representative" on a mandatory bargaining subject [26] even though it may represent only two employees in a much larger work force, the Secretary confers a "deceptive cloak of authority" on the union organizer, impedes the operator's fulfillment of his duty under the NLRA to avoid dealing with nonmajority representatives, and infringes on the other miners' right either to bargain collectively through exclusive, majority-based representation of *their* choosing, or to "refrain from" such activities if they so desire, as the NLRA entitles them to do. *See* NLRA § 7, 29 U.S.C. § 157 (1988).[27]

The UMWA's use of the Secretary's Part 40 regulations to circumvent the NLRA was not confined to Thunder Basin. As the findings of fact by the ALJ in *Kerr-McGee* unequivocally reveal, "[t]he use of 30 C.F.R. Part 40 and the designation of miners' representatives was part of the UMWA's organizing strategy and was an organizing 'tool.'" *Kerr-McGee, supra*, 13 F.M.S.H.R.C. at 1898. Because the Secretary and the Commission sim-

[26] Workplace safety and health are among the mandatory "terms and conditions of employment" that are within the scope of the exclusive representation principle. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 218 (1964) (Stewart, J., concurring).

[27] It can create other practical difficulties as well. It can force a unionized operator to deal with a representative (or more than one) of a minority group of miners despite the presence of an exclusive representative under the NLRA. It can also require operators to deal with a "labor organization," as broadly defined by the NLRA, 29 U.S.C. § 152(5) (1988), without any of the protections, rights, or obligations established by that law for employees, employers, and labor organizations. *See generally* 29 U.S.C. §§ 157, 158, 159 (1988). And it can effectively void the results of an election conducted by the NLRB and force a "representative" upon employees even after they have voted to reject that specific representation, as they did in the instant case.

ply refused to consider the violence being done to the NLRA scheme by this abuse of Mine Act procedures, every nonunion mine is exposed to such tactics if the decision below is sustained and all access to the district courts is foreclosed.

CONCLUSION

Thunder Basin's dilemma is a case in point of how the law can leave mine operators in a jurisdictional void. Their constitutional and statutory rights are infringed, but meaningful relief is unavailable, and the promise of judicial review at the end of administrative proceedings is an empty one. When statutory conflicts or constitutional questions are involved, the specialized administrative process takes too long to avert irreparable harm to an operator caught in the middle. Moreover, limitations on administrative authority enable adjudicating agencies to disclaim expertise and avoid jurisdiction, and thus to strand the operator with his rights impaired and with conflicting statutory obligations. Due process requires an avenue for relief, yet the court below would foreclose a mine operator's only possible recourse—district court. Therefore, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

Of Counsel:
EDWARD M. GREEN
MARK G. ELLIS
AMERICAN MINING CONGRESS
1920 N Street, N.W.
Washington, D.C. 20036

WILLIAM E. HYNAN
NATIONAL COAL ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036

TIMOTHY M. BIDDLE *
THOMAS C. MEANS
J. MICHAEL KLISE
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
Attorneys for Amici Curiae American Mining Congress and National Coal Association

* Counsel of Record

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